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Attorneys for Defendant
CIRCLE INTERNATIONAL CO.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

GREMLIN INDUSTRIES, a)	CASE NO. 416704
Delaware corporation,)	ANSWER TO COMPLAINT
Plaintiff,)	
vs.)	
CIRCLE INTERNATIONAL CO.)	
INC., etc. et al.,)	
Defendants.)	

Defendant CIRCLE INTERNATIONAL CO., a California corporation, for itself and no other and severing itself from all other Defendants herein, and in response to the Complaint on file herein, admits, denies and alleges as follows:

ANSWER TO FIRST CAUSE OF ACTION

1. Defendant CIRCLE INTERNATIONAL CO. INC. a California corporation (hereinafter referred to as CIRCLE) admits the allegations contained in Paragraph 1 of the Complaint on file herein.

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2. Defendant CIRCLE admits the allegations contained in Paragraph 2 of the Complaint on file herein.

3. Defendant CIRCLE, in response to Paragraph 3 of the Complaint on file herein, alleges that many of the shipments to CIRCLE from Plaintiff were C.O.D. and payable in Los Angeles, California and that only part of the shipments to CIRCLE from Plaintiff were payable in San Diego, California. Except as expressly alleged herein, Defendant CIRCLE denies generally and specifically each and every allegation contained in Paragraph 3 of the Complaint on file herein.

4. Defendant CIRCLE admits the allegations contained in Paragraph 4 of the Complaint on file herein.

5. Defendant CIRCLE lacks information or belief sufficient to enable it to answer the allegations contained in Paragraph 5 of the Complaint on file herein and based upon such lack of information or belief denies generally and specifically each and every allegation contained in Paragraph 5.

6. Defendant CIRCLE denies generally and specifically each and every allegation contained in Paragraph 6 of the Complaint on file herein.

7. Defendant CIRCLE admits that it is engaged in the business of distributing electronic video games at a place of business at 2225 West Pico Blvd. Los Angeles, California. Except as expressly admitted, Defendant CIRCLE denies generally and specifically each and every other allegation contained in Paragraph 7 of the Complaint on file herein. In particular, Defendant CIRCLE denies that it is indebted to Plaintiff in the sum of \$89,640.70, or any other sum or sums or at all.

8. Defendant CIRCLE denies generally and specifically each and every allegation contained in Paragraph 8 of the Complaint on file herein. In particular, Defendant CIRCLE denies that it is indebted to Plaintiff in the sum of \$89,640.70 or any other sum or sums or at all.

ANSWER TO SECOND CAUSE OF ACTION

9. In response to Paragraph 9 of the Complaint on file herein, Defendant CIRCLE repeats and realleges its answers to Paragraph 1 through 6 of the First Cause of Action of the Complaint on file herein and by this reference therein incorporates the same herein as though set forth in full.

10. Defendant CIRCLE denies generally and specifically each and every allegation contained in Paragraph 10 of the Complaint on file herein. In particular, Defendant CIRCLE denies that it is indebted to Plaintiff in the sum of \$89,640.70 or any other sum, or sums or at all.

ANSWER TO THIRD CAUSE OF ACTION

11. In answer to Paragraph 11 of the Complaint on file herein, Defendant CIRCLE repeats and realleges its Answers to Paragraph 1 through 6 of the First Cause of Action of the Complaint and by this reference thereto incorporates the same herein as though set forth in full.

12. Defendant CIRCLE denies generally and specifically each and every allegation contained in Paragraph 12 of the Complaint

1 on file herein and in particular Defendant CIRCLE denies that it
2 is indebted to Plaintiff in the sum of \$89,640.70, or any other
3 sum or sums or at all.

4
5 FIRST AFFIRMATIVE DEFENSE

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7 13. That the Complaint on file herein, as well as
8 each cause of action purportedly alleged therein fails to state
9 facts sufficient to constitute a cause of action against this
10 answering Defendant.

11
12 SECOND AFFIRMATIVE DEFENSE

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14 14. Defendant CIRCLE refers to its Cross-Complaint
15 on file herein and by this reference incorporates the same herein
16 as though set forth in full.

17
18 THIRD AFFIRMATIVE DEFENSE

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20 15. That at the time and place of each order from
21 Defendant CIRCLE to Plaintiff, said Defendant made known to Plaintiff
22 the particular purpose for which the goods were purchased. In
23 particular, Defendant CIRCLE informed Plaintiff that said electronic
24 games were to be sold to Defendant CIRCLE's customers for on-location
25 use, primarily in arcades, taverns and bars.

26 Defendant CIRCLE, at the time and place of each such
27 order relied on Plaintiff's skill and Judgment to select goods
28 suitable for said Defendant's purpose, all of which was well known

1 to Plaintiff.

2 16. That Plaintiff, at the time and place of each
3 Order, impliedly warranted that the goods were fit for Defendant
4 CIRCLE's purpose as hereinabove alleged.

5 17. That the goods were not fit for Defendant CIRCLE's
6 purpose, but were, in fact, unsuitable for said purpose in that
7 vast numbers of said electronic games were defective and failed
8 to operate properly due to broken or missing parts, shoddy workman-
9 ship or improper assembly during manufacture; thus rendering said
10 goods of no value to Defendant CIRCLE for resale, or otherwise.

11 18. That immediately upon discovery of said defects
12 beginning in early November of 1977, Defendant CIRCLE discovered
13 that the warranty of Plaintiff was false and immediately gave to
14 Plaintiff due and timely notice thereof; but received no rectifi-
15 cation of the afore-described defects from Plaintiff.

16 19. By reason of the foregoing Defendant CIRCLE
17 could not fill orders to its customers on time, thus causing
18 said orders to be cancelled, had to pay service department personnel
19 at Defendant CIRCLE's premises overtime premium to attempt to
20 correct said defects in order to be able to ship said electronic
21 games; incurred additional handling costs; and had to issue credits
22 to some of its customers. The exact amount of Defendant CIRCLE's
23 damages have not yet been ascertained, but said Defendant is
24 informed and believes and thereon alleges that said items of
25 damages exceed the amount sued for by Plaintiff. Defendant
26 CIRCLE will seek leave of Court to amend its Answer to Complaint
27 when the exact amount of its damages have been ascertained or
28 according to proof at the time of trial.

FOURTH AFFIRMATIVE DEFENSE

20. That beginning on or about November 1, 1977, Plaintiff sold to Defendant CIRCLE electronic games to be used by said Defendant for resale to its customers primarily for commercial on - location use at arcades, taverns, bars.

21. That at all times herein mentioned Plaintiff GREMLIN INDUSTRIES was and now is, a merchant with respect to the kind of goods sold to Defendant CIRCLE as hereinabove alleged and described.

22. That Plaintiff GREMLIN INDUSTRIES, at the time and place of each said sale, impliedly warranted that said electronic games were of merchantable quality.

23. That said electronic games were not of merchantable quality, but in fact were defective in that many of said games failed to operate properly, had missing or broken parts, or were improperly assembled during manufacture.

24. That, therefore, said electronic games were of absolutely no use to Defendant CIRCLE, had no value, and could not be sold to Defendant's customers.

25. That beginning in early November, 1977, immediately upon discovery of each defect as hereinabove alleged, Defendant CIRCLE gave Plaintiff due and timely notice of the defective quality of said goods.

26. By reason of the foregoing, Defendant CIRCLE could not fill orders to its customers on time, thus causing said orders to be cancelled, had to pay service department personnel at Defendant CIRCLE's premises overtime premium to attempt

1 to correct said defects in order to be able to ship said electronic
2 games; incurred additional handling costs; and had to issue credits
3 to some of its customers. The exact amount of Defendant CIRCLE's
4 damages have not yet been ascertained, but said Defendant is
5 informed and believes thereon alleges that said items of
6 damages exceed the amount sued for by Plaintiff. Defendant CIRCLE
7 will seek leave of Court to amend its Answer to Complaint when
8 the exact amount of its damages have been ascertained or according
9 to proof at the time of trial.

11 FIFTH AFFIRMATIVE DEFENSE

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13 27. That in or about November 1977, Plaintiff GREMLIN
14 INDUSTRIES, through its President, Frank Fogleman, agreed to
15 accept merchandise invoiced to Defendant CIRCLE in the approximate
16 minimum amount of \$29,000.00, said goods to be returned to Plaintiff
17 and credit to be issued to Defendant CIRCLE, for the reason that
18 said goods were defective.

19 28. In reliance upon Mr. Fogleman's agreement to issue
20 credit for said returns in consideration of the defects relative
21 to said \$29,000.00 of goods, Defendant CIRCLE, through its President
22 Mr. Dean McMurdie, arranged to, and did, have said goods returned
23 to Plaintiff.

24 29. That in breach of its agreement to accept said
25 goods for return and issue credit thereon, Defendant GREMLIN
26 refused to accept delivery of said goods, thus causing them to
27 be returned to Defendant CIRCLE; and thus causing Defendant CIRCLE
28 in incur roundtrip freight charges. When the exact amount of said

1 charges are determined, and according to proof at the time of
2 trial, Defendant CIRCLE will seek leave of Court to amend this
3 Answer to set forth the same.

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5 SIXTH AFFIRMATIVE DEFENSE

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7 30. That Plaintiff failed to timely deliver numerous
8 orders to Defendant CIRCLE, thus causing said Defendant to lose
9 business due to order cancellations, and to lose profits on resale.
10 Defendant CIRCLE will seek leave of Court to amend this Answer
11 when the exact amount of said lost sales, or profits, have been
12 ascertained or according to proof at the time of trial.

13
14 SEVENTH AFFIRMATIVE DEFENSE

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16 31. That Plaintiff GREMLIN INDUSTRIES, INC., is the
17 sole manufacturer and only source of the electronic game products
18 and/or parts which it manufactures. Further, said Plaintiff only
19 sells its products, including parts, to distributors for resale
20 to the ultimate purchaser.

21
22 32. That at all times herein mentioned, or relevant,
23 Defendant CIRCLE was, and is, a distributor of products and/or
24 parts manufactured by Plaintiff. Further, Plaintiff GREMLIN
25 INDUSTRIES, INC. since in or about November, 1977, has been
26 selling its electronic game products and/or parts to other dis-
27 tributors who compete with Defendant CIRCLE in the same market-
28 place, and who are in the same category of a distributor, as is

1 Defendant CIRCLE.

2

3 33. Since at least in or about November, 1977, Plaintiff
4 has offered for sale and sold to other distributors, aside from
5 Defendant CIRCLE, and who are in direct competition with Defendant
6 CIRCLE, in the same marketplace, each and all of Plaintiff's
7 products at Plaintiff's normal established prices; while at the
8 same time forcing Defendant CIRCLE to pay a 150% "premium price"
9 for such games and/or parts.

10

11 34. Accordingly, said Plaintiff has been engaging in an
12 unfair trade practice in that said Plaintiff has charged to
13 Defendant CIRCLE a price differential which is discriminatory,
14 as compared to the price for which Plaintiff's games and/or parts
15 were sold by Plaintiff to others in the same functional classification
16 as a distributor, as is Defendant CIRCLE.

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18 35. Said acts of Plaintiff have been, and are, intentional
19 and for the purpose of injuring and/or destroying Defendant
20 CIRCLE's competitive market-place position.

21

22 36. That as a direct and proximate result of said acts
23 of Plaintiff, Defendant CIRCLE has been deprived of the patronage
24 of a large number of its actual and potential customers, all to
25 its damage in a sum which Defendant CIRCLE is informed and
26 believes, and thereon alleges, exceeds \$100,000.00. Further,
27 Defendant CIRCLE is entitled to treble its actual damages, plus
28 costs and attorneys' fees, pursuant to the provisions of

1 CALIFORNIA BUSINESS AND PROFESSIONS CODE, Section 17802. When
2 Defendant CIRCLE ascertains the exact amount of its damages, it
3 will seek leave of Court to amend this answer to the complaint,
4 to set forth the same, or according to proof at the time of trial.

6 EIGHTH AFFIRMATIVE DEFENSE

8 37. This answering Defendant repeats and realleges the
9 allegations contained in Paragraphs 31 through 36, and by reference
10 thereto incorporates the same herein as though set forth in full.

12 38. That each and every transaction wherein Plaintiff
13 charged Defendant CIRCLE a 150% "premium price" surcharge is an
14 illegal contract within the meaning of CALIFORNIA BUSINESS AND
15 PROFESSIONS CODE, Section 17051, and Plaintiff is not entitled to
16 recovery on each and all of said transactions.

18 WHEREFORE, Defendant CIRCLE prays Judgment against
19 Plaintiff, as follows:

20 1. That Plaintiff take nothing by virtue of its
21 Complaint on file herein;

22 2. For Judgment on Defendant CIRCLE's Cross-Complaint
23 on file herein;

24 3. That Defendant CIRCLE's actual and statutory treble
25 damages be set off against any amount which the Court may find
26 to be due to Plaintiff;

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28

1 4. For reasonable attorneys' fees pursuant to BUSINESS
2 AND PROFESSIONS CODE, Section 17802;

3 5. Costs of suit incurred herein;

4 6. For such other and further relief as the Court may
5 find just and proper.

6
7 DATED this 19 day of September, 1978.

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9 KIRSCH, ARAK AND BULMASH

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11 *Richard J. Greene*
12 _____
13 RICHARD J. GREENE, Attorneys for
14 Defendant CIRCLE INTERNATIONAL CO.
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